No. 03-21-00053-CV

In the Court of Appeals for the Third District of Texas at Austin

Mary Louise Serafine, *Appellant*

v.

Karin Crump, in her individual capacity, and Lora J. Livingston, in her official capacity, as Presiding Judges of the 200th Civil District Court of Travis County, Texas; Melissa Goodwin, in her individual and official capacities as Justice of the Third Court of Appeals at Austin, Texas; David Puryear and Bob Pemberton, in their personal and individual capacities, including as former justices of the Third Court of Appeals at Austin, Texas; and Thomas Baker and Gisela Triana, in their official capacities as Justices of the Third Court of Appeals at Austin,[1]

Appellees

From the 345th Judicial District Court of Travis County, Texas,
Hon. Todd A. Blomerth, presiding,
Cause No. D-1-GN-19-002601

CORRECTED APPELLANT'S REPLY TO APPELLEE JUSTICES' BRIEF

John W. Vinson
State Bar No. 20590010
Counsel of Record
John W. Vinson, PLLC
PO Box 301678, Austin, Texas 78703
Tel: (512) 926-7380
Email: johnvinsonatty@yahoo.com

Mary Louise Serafine
State Bar No. 24048301
Mary Louise Serafine,
Attorney & Counselor at Law
P.O. Box 4342, Austin, Texas 78765
Tel: (512) 220-5452
Email: serafine@mlserafine.com

Attorneys for Plaintiff

ORAL ARGUMENT REQUESTED

[1] The caption of this case includes Judge Livingston and Justices Baker and Triana, accurately reflecting the operation of automatic successor substitution rules in the case since 2019—Fed. R. Civ. P. 25(d) and Fed. R. App. P. 43(a), and the operation in this appeal of Tex. R. App. P. 7.2. *See* Tabs 4, 5, 6, Appellant's First Amended Brief.

TABLE OF CONTENTS

FORM OF RECORD REFERENCES

REPORTER'S RECORD & SUPPLEMENT	**RR.[vol. no.]:[pg. no.]** **RRSUPP:[pg. no.]**
SWORN RECORD & SUPPLEMENT: N.B.: This substitutes for a clerk's record.	**SR:[pg. no.]** **SRSupp1:[pg. no.]**
TAB	**Bookmarked tab in Appendix attached to appellant's opening brief.**

ERRATUM

Appellant's opening brief on page 64 states that, "At the hearing, the trial court admitted into evidence...more than a hundred pages showing that Serafine has paid out of pocket over $200,000 [in attorney's fees to her counsel]. The citation given is SR:64. It should be RR.1:64—that is, citing the hearing transcript, page 64, not the sworn record (which is substituted for a clerk's record).

TO THE HONORABLE THIRD COURT OF APPEALS:

Appellant Mary Louise Serafine replies to Appellee Justices' Brief (Js' Br.).

INTRODUCTION

To declare someone a "vexatious litigant" under Chapter 11 of the Civil Practice & Remedies Code (CPRC), the statute places the burden of proof exclusively on defendants who bring the motion—here, Appellee Justices. They also have the burden here to show that they met the burden before the trial court. The Justices' response brief shows that they did not meet the burden below. Here on appeal, they do not cite any evidence for the many criteria they needed to prove.

At the same time, Appellant Serafine, the non-movant, need do nothing, not even make a defense (although she did so).

Appellant's opening brief (App. Br.)[2] summarized the proceeding below by saying, "Defendants offered no admissible evidence to meet either the first or second prong of Chapter 11." App. Br. 12. Appellant now replies to the Justices' brief by showing it reinforces rather than defeats that statement. Virtually the entirety of their brief fails to show what it needed to show: that the Justices did meet their burden *in the trial court* by presenting evidence. Presenting it here

[2] The relevant filing is *Appellant's First Amended Brief with Supplement*, filed 8/2/2021.

would be too late, but in any event the entirety of the Justices' brief ***never*** cites the reporter's record's admitted or offered exhibits in Volume 2. It contains only four citations to the hearing transcript: one to show the date of the hearing; one as support for an inconsequential footnote; and twice to refer to the same legal argument made by the Justices' counsel, where she referred to self-made exhibits that are not in the record and were never authenticated, offered, or admitted.

Instead of showing that Appellees had proved their case in the trial court, the Justices' brief merely strews factual assertions unsupported by record evidence; makes legal arguments about which there is no showing they were made in the lower court; and spouts *ad hominem* attacks below the standard of American courts. Disturbingly, the Justices appear to assume this Court will find this acceptable. All of this shows that this Court should have recommended and the Supreme Court should have granted Appellant's motion to transfer this and the related *Blunt* case to a neutral court of appeals.

We turn to these lack-of-evidence issues after first showing that the Court does have jurisdiction, as the Justices ultimately concede. Js' Br. 17. In a final section we review Texas policy that the Court may not rescue Appellees from their errors.

ARGUMENT

I. The Court has jurisdiction over this §11.101 appeal.

We recognize that a court can evaluate its own jurisdiction at any time.

A. *Chapter 11 provides for limited interlocutory appeal.*

As courts have pointed out,[3] Chapter 11 of the Civil Practice & Remedies Code (CPRC) provides two different methods for penalizing what the statute deems a "vexatious litigant." Appellees essentially concur. Js' Br. 15-17. The first method is under Section 11.051. It allows a court to "determin[e] that the plaintiff is a vexatious litigant and requir[e] the plaintiff to furnish security." CPRC §11.051. Importantly, this section, using the word "and," requires both determinations—if security is required, then the plaintiff must also be declared a vexatious litigant.

The second method is under Section 11.101, where a court may "enter an order prohibiting a person from filing, *pro se*, a new litigation [without permission]" —called the "pre-filing" or "pre-clearance" order—but only "if the court finds...that the person is a vexatious litigant." CPRC §11.101(a). Again this method requires both determinations.

---

[3] As one example, *see Florence v. K. Rollings*, No. 02-17-00313-CV (Tex. App.—Fort Worth Aug. 30, 2018) (mem. op.)

As to the second method, the statute provides, "A litigant may appeal from a prefiling order entered under Subsection (a) designating the person a vexatious litigant." CPRC §11.101(c), "Several courts have interpreted [this] as providing for an interlocutory appeal," *Florence v. K. Rollings*, No. 02-17-00313-CV (Tex. App.—Fort Worth Aug. 30, 2018) (mem. op.).

The Justices recognize this. Js' Br. 16 (the same "immediately appealable").

This means that, to appeal the pre-filing or pre-clearance order, an appellant plainly needs to dispute the validity of the vexatious litigant designation. The section itself refers to a "prefiling order ***entered under Subsection (a) designating the person a vexatious litigant."*** Section 11.101(c) (emphasis added). For example, the Fort Worth court, after concluding "we have jurisdiction over [appellant's] appeal from the prefiling order..." then turns to an extended analysis of "The Trial Court's Vexatious-Litigant Finding." *Florence*, No. 2-17-00313-CV, *supra*.

Notably, the *Florence* court analyzes the "Vexatious-Litigant Finding" even though, as here, appellant "has not furnished the ordered security....[and] the trial court has not dismissed [appellant's] claims." *Ibid.* In other words the absence of dismissal and signed judgment did not prevent the appellate court from

reviewing the vexatiousness finding.

Similarly the opinion in *Walp* "review[s] the trial court's finding" that appellant was a vexatious litigant. *Walp v. Williams*, 330 S.W.3d 404, 407 (Tex. App.—Fort Worth 2010) (Dauphinot, J., concurring). There, the court concluded that it "cannot consider" a particular piece of evidence ***"because [it] was not produced in the trial court."*** *Ibid.* (emphasis added). As a result, the trial court could not have determined whether its substance met the criteria (was final, *pro se*, adversely determined, in the past seven years, etc.). Nevertheless the trial court—with only four instead of five qualifying cases—designated the plaintiff vexatious.

Walp is important because in addition to finding "that the trial court abused its discretion by finding Walp a vexatious litigant and dismissing his claim...," *id.*, "***the trial court also abused its discretion by ordering Walp to post the security...."*** *Ibid.* (emphasis added). The appellate court therefore "reverse[d] the trial court's order finding Walp a vexatious litigant and dismissing his claim ***for failure to post security***...." *Id.* (emphasis added). In effect, the *Walp* court actually did reach and reverse the requirement of security.

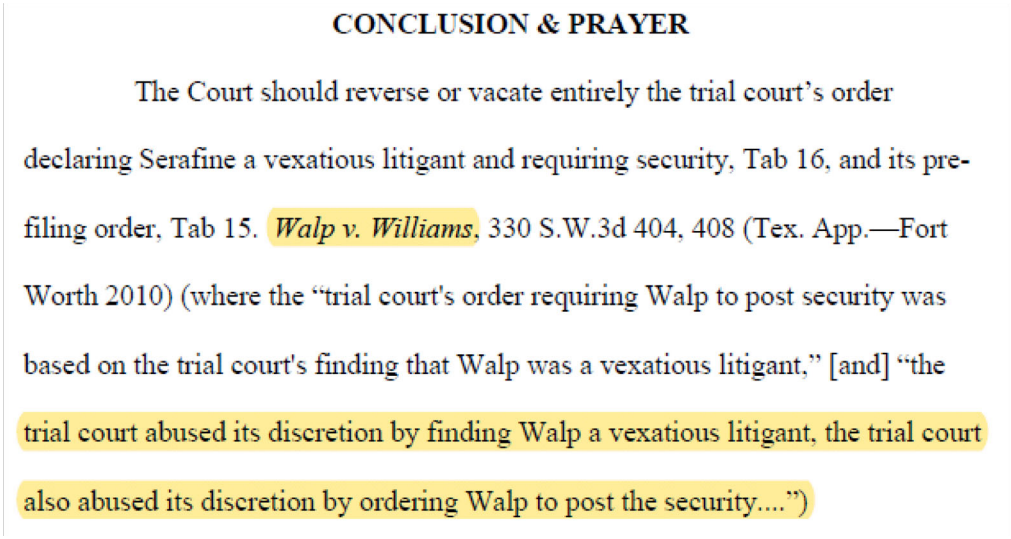
There could be no other result. It could never be the case that—after a judge abuses discretion by finding a condition precedent to a punishment—that the

punishment remains although the ruling was wrong.

There are few other precedents because appellate reversals of vexatious litigant findings are rare; but this is the correct result.

B. ***This is a §11.101(c) appeal that includes the vexatiousness finding.***

Appellant's brief (App. Br.) does not complain about that part of the trial court's orders that is unappealable—the $5,000 security required to proceed with the case. Appellee-Justices cite no passage in Appellant's brief—and there isn't one—where Appellant asks the Court to find that $5,000 is too much money, that the judge unfairly assessed it, that the time allowed to produce it was too short, or some other error surrounding the security. Instead, as it must, Appellant's brief spends 52 pages on the heart of the matter, App. Br. 74, that "No evidence supports the first prong of Chapter 11" and "No evidence supports the second prong, as Defendants concede." App. Br. 23-74 (Arguments II and III). Appellant wants the vexatious litigant designation reversed or vacated. Thus, Appellant's brief's Prayer seeks the same relief granted in *Walp*:



CONCLUSION & PRAYER

The Court should reverse or vacate entirely the trial court's order declaring Serafine a vexatious litigant and requiring security, Tab 16, and its pre-filing order, Tab 15. *Walp v. Williams*, 330 S.W.3d 404, 408 (Tex. App.—Fort Worth 2010) (where the "trial court's order requiring Walp to post security was based on the trial court's finding that Walp was a vexatious litigant," [and] "the trial court abused its discretion by finding Walp a vexatious litigant, the trial court also abused its discretion by ordering Walp to post the security....")

App. Br. 74.

C. *"All Hat, No Cows" describes the Justices' jurisdictional claim.*

The Justices' caption for their opening argument promises something big when it begins, "This Court Lacks Jurisdiction Over Serafine's Appeal...." Js' Br. 15. But the Justices conclude their short two pages on the topic by conceding their claim is exceedingly narrow: "[T]o the extent [this is an appeal of Section 11.051], this Court does not have jurisdiction to hear her appeal given that there is no final judgment in this case." Js' Br. 17. But of course that is not what is appealed. The Justices make no contention to the contrary and to nothing to show that this appeal concerns the $5,000 security. Only Appellant's prayer seeks the same relief as in *Walp*, to reverse the order for security.

The Justices do not distinguish, criticize, or even mention *Walp*. Incredibly,

they cite to the Prayer, but proceed as though it wasn't mentioned *Walp*. Js' Br. 17 (citing App. Br. 74). The Justices concede as to *Walp's* role here.

To summarize: The Court has jurisdiction under Section 11.101(c) over this appeal and Appellant's showing that, if the designation of vexatiousness is reversed or vacated, the order for $5,000 in security should also be reversed or vacated.

We will delay addressing the Justices' second argument about whether they provided evidence to meet the vexatious litigant requirements, in order to proceed to the Justices' third and final argument, because it is also on jurisdiction.

II. This Court has jurisdiction over Appellant's three other issues.

Cavalierly purporting to sweep aside every remaining argument in barely more than a page, the Justices aver that "This Court Lacks Jurisdiction Over Serafine's Remaining, Meritless Claims." Js' Br. 34-35. In reality, nothing in their three paragraphs shows lack of jurisdiction or that Appellant's claims are "meritless."

A. *Serafine's remaining issues are subsumed within the appeal.*

The Justices assume—without grounds—that Serafine is somehow raising these three issues as though they are being appealed independently. They are not. They are clearly presented as issues that bear directly on the trial court's abuse of

discretion in designating Serafine as a vexatious litigant; they need resolution as part of adjudicating this main issue.

Albeit in a different context, one court notes that the purpose of interlocutory appeals is "promoting judicial economy." *City of Elsa v. Diaz*, No. 13-19-00109-CV (Tex. App.—Corpus Christi-Edinburg Apr. l 2, 2020). Consistent with this purpose, "jurisdiction over [an] interlocutory appeal" includes "those issues subsumed within it." *Peters v. Blockbuster*, 65 S.W.3d 295, 301 (Tex. App.—Beaumont 2001) (overruled in part on other grounds, *Compaq Computer Corp. v. LaPray*, 79 S.W.3d 779 (Tex. App.— Beaumont 2002). Serafine's Appellant's brief showed in detail that, *as part of making this appeal*:

(1) she was entitled below to findings of fact and conclusions of law (FFCL);

(2) she was entitled below to a change of venue so that proceedings here and below would not proceed before Defendant-appellees' own courts; and

(3) she was entitled below to the mandatory protections of the TCPA.

App. Br. 14-22.

The Justices point to nothing in Texas law—and there is nothing—that suggests that the mandatory provisions of the TCPA are somehow trumped by Chapter 11. The Court should not graft new language onto either statute to bring this into effect.

As the record and Appellant's brief make clear, Serafine's side proposed the correct solution to the conflict between the TCPA and Chapter 11: They noticed her venue change and TCPA motions for the same agreed-upon full day of hearings as defendants' Chapter 11 motions. App. Br. 19-20. This would have solved the problem fairly, but the trial court rejected it out of hand.

B. *The Justices misrepresent Willms.*

This passage is from the Justices' appellees' brief:

> if there were, "the vexatious litigant statute does not require written findings of fact and conclusions of law," therefore, it was not error for the trial court to decide not to issue any. *Willms v. Americas Tire Co., Inc.*, 190 S.W.3d 796, 802 (Tex. App.—Dallas 2006, pet. denied), opinion supplemented on denial of reh'g (May 5, 2006).

Js' Br. 34.

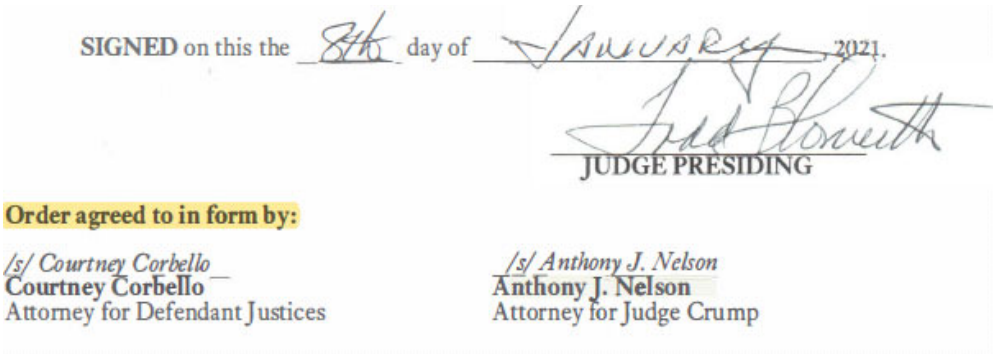
This passage falsely attributes to *Willms* the second proposition above—that "therefore it was not error for [Judge Blomerth] to decide not to issue [FFCL]." This is simply false. *Willms* makes clear it did not reach the question of FFCL in a Chapter 11 case. The *Willms* court explained it was "assuming, without deciding" that FFCL were required, because it wanted to reach the question of whether—even if findings and conclusions were required—the Willmses sustained harm on appeal. *Id.* at 802. This is far different from the Justices' assertion that in

Willms the Dallas court left trial courts free to refuse to issue FFCL. The Dallas opinion further states, "we do not find any cases" on the issue. *Id.* The Court should not be the first to hold that Chapter 11 is somehow an exception to the rationale in Texas jurisprudence for FFCL.

Setting aside the misrepresentation and bad policy, the Justices' invented holding is a *non sequitur*. The absence of a requirement in one statute does not show there is no requirement in another statute or law. The majority of Texas statutes do not require or mention FFCL. They do not need to—Texas Rule of Civil Procedure 296 already requires them.

C. *Defense counsel have unclean hands and the orders have some finality.*

Defense counsel alone drafted the final orders declaring Serafine a vexatious litigant and requiring her to pay security. Tabs 15, 16 at SR:1413-1415. No one disputes that she did not pay. Appellees now claim that the orders they themselves drafted cannot be appealed because of what the orders say. The bottoms of both orders show approval only by defense counsel, not plaintiff's counsel. The signatures are the same on both orders. Here is one of them:


SIGNED on this the 8th day of January 2021.

JUDGE PRESIDING

Order agreed to in form by:

/s/ Courtney Corbello
Courtney Corbello
Attorney for Defendant Justices

/s/ Anthony J. Nelson
Anthony J. Nelson
Attorney for Judge Crump

Tab 16, SR:1415.

Section 11.056 provides that "[t]he court ***shall*** dismiss a litigation as to a moving defendant if a plaintiff ordered to furnish security does not furnish the security within the time set by the order." §11.056 (emphasis added). Dismissal is mandatory.

But Appellees' self-drafted order defies the statute and states instead: "Failure to timely furnish security ***may*** result in dismissal of this suit." SR:1415 (emphasis added). This was clearly intentional and intended to deceive. It did not need to be said because the statute already says so. Or Appellees could have simply drafted the order to refer to the statute. Appellees' counsel (and the judge)[4] were well familiar with the statute; they knew or should have known the order was contrary to the statute.

[4] Case law searches establish at least one other Chapter 11 case decided by this judge.

Any Defendant-appellee could have sought dismissal of the entire Section 1983 case against all of them—and a judgment—but none did so.

Nothing requires Serafine to seek a judgment against herself.

Appellant's brief sets out that these Jurists have engaged in bad faith delay for nearly four years—since filing of this case in federal court in December, 2017. In order to thwart discovery, avoid the merits of the Section 1983 case against them, and use delay to sabotage the need for prospective relief in *Blunt*, *see, e.g.,* App. Br. 1, 5, 12, 18, Defendant-appellees removed this case to a federal court in which they had just won lack of jurisdiction, App. Br. 6-7, then filed purported vexatiousness motions to leverage the stay, and withheld setting them for hearing for an entire year. App. Br. 8. They should not now be permitted another bad faith delay tactic.

The Justices say that Serafine did not do anything to move the case along. She was required to comply with the stay, however, and nothing mandates that she set another party's motion so that it can proceed against herself.

Finally, the orders do have some finality. Section 11.056 mandates dismissal if Serafine fails to pay. This would dispose of all claims against all defendants, which is arguably sufficient to permit appeal.

To summarize: The Court has jurisdiction over this appeal under Section

11.101(c), as Appellees agree; the Prayer does nothing more than request relief that a sister court has held is proper in a reversed case.

III. The Justices' brief confirms that they failed in the trial court to prove up the requirements for meeting Prong One and Prong Two.

We first address the Justices' assertions of fact as they appear in their "Statement of the Case," Js' Br. 9-11, "Introduction," Js.' Br. 9, and "Statement of Facts," Js' Br. 12-14. We then address their Argument section, Js' Br. 17-34.

A. *As a general matter, the Justices' dispositive "facts" are unsupported by evidence.*

The Justices presented virtually no evidence to the trial court—and cite none here—that proves facts going to Prong One or Prong Two. The only sworn testimony in this matter was that of Serafine at the hearing on 12/30/202. RR1:57 (Serafine sworn). To get the evidence they needed, defense counsel should have deposed Serafine or cross-examined her after she testified under oath at the hearing. The judge offered cross-examination, but they declined it:

> MS. CORBELLO: No questions from me, Your Honor.
>
> THE COURT: Mr. Nelson?
>
> MR. NELSON: No questions at this time, Your Honor.

RR.1:114.

The judge asked defense counsel again, "Does anybody have any questions on those issues?" Again all defense counsel declined. RR.1:121.

The judge offered a third time, and defense counsel again refused. RR.1:132.

Steadfastly refusing to develop their own real evidence, the Justices relied below and here on their own unsupported fabrications, which, disturbingly, they appear to expect this Court to accept.

What they should have asked. Defense counsel should have asked Serafine to justify plaintiff's filings or the allegations in the petition, potentially to show they were baseless. Or other witnesses could have conducted the analyses in the petition and testified to that point.[5]

Defense counsel could have asked Serafine to describe the substance and context of each filing on their list, potentially to prove the matters were "finally determined adversely," were "final judgments" not later reformed or reversed on appeal, and met other criteria. Or someone else could have testified after studying

[5] On the veracity of the petition's allegations: The petition so clearly cites the record evidence and computer analyses of the Jurists' falsified opinions and orders that anyone, if they had the record filed in this Court, could test the allegations to determine their validity.

the files. Or they could have attacked Serafine's credibility.

Instead, defense counsel eschewed producing evidence to the trial court. Although certain documents that had been attached to their motion were authenticated, they do not appear to have been entered into evidence. RR.1:47-50. Even if they were, none of them self-proves that they met any criteria. ***If any had met the criteria, the trial court should have received evidence that the substance and context of each document rendered it in conformity with Section 11.054.***

Courts should reverse a vexatious litigant order if the defendant-appellee did not show that the substance of a claim was presented to the trial court because, if its substance was not presented, the trial court had no reason to determine that the claim met the criteria. *Walp*, *supra*, 330 S.W.3d at 407.

Far contrary, Serafine's testimony, admitted exhibits, and filed opposition to Defendant-appellees motions had showed that each documents except one ***did not meet the criteria.*** *See* App. Br. 54 (chart of documents). *Even the 2020 documents* that Appellees erroneously proffered long after the motion was filed—the Fifth Circuit dismissal of appeal and Supreme Court denial of certiorari—are plainly the same case.

Except for the four minor instances, *supra*, the Justices' appellee brief cites exclusively to their own attachments to motions. Such attachments are not

evidence. *Happy Jack Ranch, Inc. v. HH&L Development, Inc.*, No. 03-12-00558-CV *n. 7 (Tex. App.—Austin Nov. 6, 2015).

Nothing cures that these documents do not meet §11.054 criteria. Even if we assume that Defendant-appellee's attachments to their motion do count as evidence, it is still not the case that the Justices—anywhere at any time—explained why these documents, many of which plainly have the same style or case number, met the Section 11.054 criteria of being adversely-determined, final, or *pro se* as "litigations," etc. They did not explain it below or here. Explanation would have revealed the same thing that Serafine's evidence showed: there aren't five qualifying litigations here.

The danger of changing precedent. Accepting the Justices' documents as "litigations" would place the Court in conflict with its own and other court's construction of the 11.054 criteria. It would also tend to show what Appellant has elsewhere alleged, that Chapter 11 has become weaponized as a tool to crush unpopular suits, ideas, and people.

Grasping at straws, the Justices aver that their documents show eight "*pro se*" ***litigations*** because they claim that Serafine signed some documents. There is no evidence of this fact anywhere, but even if there were, there is no authority that a single document renders an entire litigation *pro se*.

Finally, although the Justices claim that "delay" harmed them, they could have cured delay at any time in the last four years by filing a motion for summary judgment on the merits. But they did not do so. Nor did they file in the instant case a Rule 91a dismissal, or challenge the petition by exceptions, or take other measures.

The Justices' litany of Appellant's supposedly "dilatory" filings fails to allege that any filing made by Serafine's side was unlawful, frivolous, lacked merit, missed its deadline, or was otherwise flawed in substance. Instead the Justices complain only that Serafine's side made lawful filings. So, they want to punish her by getting her declared a vexatious litigant.

This is exactly the denial of due process that Serafine claims—that the Justices seek to crush Serafine's ability to make lawful filings. The U.S. Supreme Court eloquently warns against this:

> To punish a person because he has done what the law plainly allows him to do is a due process violation of the most basic sort....For while an individual certainly may be penalized for violating the law, he just as certainly may not be punished for exercising a protected statutory or constitutional right.

United States v. Goodwin, 457 U.S. 368, 372 (1982) (quotation marks and citations

omitted).

This is also the identical type of infringement of first amendment petition rights that the TCPA is intended to stop.

We now turn specifically to the brief's separate fact sections.

1. *The Justices' Statement of the Case lacks supporting evidence.*

The Justices' brief has the same requirements as Appellant's brief. Tex. R. App. P. 38.2(a)(1). Its Statement of the Case needed to "be supported by record references," "should not discuss the facts," and "should seldom exceed one-half page." Tex. R. App. P. 38.1(d). Far contrary, the Justices' statement of the case extends for two and a half pages, presents some two dozen purported facts—unsupported or poorly supported by record references (what is "Dkt. 5"?)—and adds their own sundry unsubstantiated opinions. Js' Br. 9-11. Serafine disputes the truth or completeness of the Justices "facts." Specifically, as shown above, Judge Yeakel's dismissal was ***without prejudice***, permitting the same suit to be properly re-filed. Appellees did not "attempt" to remove it, they *did* remove it—to the court of the former chief judge of *this* Court, a court they knew lacked jurisdiction because the won that relief themselves. This requiring another 80 filings.

As to the remaining facts asserted by Appellees: Their Chapter 11 motions were untimely, as Appellant's brief shows, which Appellees do not specifically challenge. Appellant was barred by the stay and not required to schedule a motion against herself. Texas courts hold that the only remedy for a trial court's refusal to hear a TCPA motion is by immediate mandamus. The Justices again decry that Appellant took a lawful step, required by other courts to avoid forfeiture. Appellant's subpoenas were considered duly served. No "court staff" were subpoenaed. The trial court issued both orders simultaneously.

2. *The Justices' Introduction mocks the Court.*

Ethical obligations constrain lawyers from false, unsupported statements in briefs. By rule, all contentions in briefs in this Court must be supported by citations to the record. *Espinoza Valle v. Hertz Electric, LLC*, No. 03-20-00056-CV (Tex. App.—Austin May 19, 2021). Most courts strike briefs that fail in this regard.[6] There is no exception to these mandates because a party titles their unsupported, false or misleadingly incomplete statements "Introduction."

---

[6] *City of San Antonio v. Davila*, No. 04-20-00478-CV (Tex. App.—San Antonio Feb. 4, 2021) (striking "brief [that] lacks appropriate citations to authorities and to the record"); *In re A.B.*, No. 05-21-00261-CV * ¶1 (Tex. App.—Dallas June 17, 2021) (same); *Patrick v. Deutsche Bank National Trust Co.*, 01-17-00583-CV (Tex. App.—Houston [1st Dist.] Sept. 26, 2017) (same).

But the Justices' brief opens with inflammatory diatribe—all free of citation to anything, anywhere, especially this evidentiary record. Js' Br. 9.

Most courts "will not allow the appeals process to be used by a litigant to make *ad hominem* attacks on an opposing party...." *Lookshin v. Feldman*, 127 S.W.3d 100, 107 (Tex. App.—Houston [1st Dist.] 2003, pet. denied) (awarding sanctions for such attacks, among other reasons). Remarkably, this is a brief authored or approved by three justices and five assistant attorneys general.

Appellant disputes each purported "fact" in the Introduction, Js' Br. 9. These are blatantly false, incomplete, exaggerated, or extracted from their context—in order to be misleading.

The Introduction tellingly demonstrates, however, that this case is so integrally related to the *Blunt* case that the Justices ***open their own brief*** with information that likely could be obtained only from the Court's former clerk and staff attorney—Amanda Taylor, now the Blunt's lawyer, who makes the same misleading allegations—or the *Blunt* trial court itself, Judge Livingston. These are the very reasons that Appellant twice requested that this and the *Blunt* case be transferred to neutral appellate courts.

To be specific: It is the Blunts, not Serafine, who caused "nine years" of litigation with an admittedly-perjurious counterclaim against Serafine, followed by

delay caused by Defendant-appellees here. Only the Blunts, their lawyer, and Appellees here falsely describe the damage to Serafine's house as a "property line dispute"—as though such a dispute lacks weight.

Most importantly, Serafine did not sue Judge Crump for "daring" to make rulings against Serafine. Serafine sued Judge Crump and these Justices for the necessary, prospective relief that Section 1983 provides, because these jurists essentially lied in their opinions and orders about procedural events within their own direct knowledge and tampered with the record to support their fabrications.

Appellees could easily develop evidence that these allegations are false, that anyone has been "harassed," or at least show that the allegations are "frivolous." They certainly could allege harassment and frivolousness in their formal documents that address the petition and the complaint in federal court. They have not done so.

The Justices next state that their "careers, reputations and...credibility" has been "maligned." Again their remedy is simple: Defeat Serafine on the merits.

The Justices then ask this Court to affirm the trial court because of these "exact actions"—which they themselves conjured from whole cloth, not record evidence. The Court should decline.

3. *The Justices' Statement of Facts is substandard.*

By rule, the Statement of Facts must be "without argument" and "supported by record references." Tex. R. App. P. 38.1(g). *Keever v. Finlan*, 988 S.W.2d 300, 314 (Tex. App.—Dallas 1999) (brief must contain concise, nonargumentative statement of the facts of the case, supported by record references).

The Justices' Statement of Facts is far off the mark. The problem with the Justices' statement of facts is that it fails to demonstrate that evidence of the Justices' central facts was actually presented to the trial court. Js' Br. 12-14. Appellate courts require record evidence not merely to know the facts. They also need to know that evidence of the facts was placed before the trial court. *Hawxhurst v. Austin's Boat Tours*, 550 S.W.3d 220, 230 (Tex. App.—Austin 2018) (appellate court is "not required to sift through the record in search of evidence"); *Baish v. Allen*, No. 02-17-00146-CV (Tex. App. —Fort Worth Mar. 21, 2019) (same).

As an initial matter, Appellant roundly disputes that the Court was entitled to consider Documents 9 and 10, for the reasons in Appellant's brief, which we discuss in the argument section.

The Justices open their Statement of Facts with a false, unsupported statement: that this is "[Serafine's] second suit against Appellee Justices..." Js'

Br. 12. As Appellant has briefed multiple times (never challenged by Defendant-appellees), this is the first and only suit—identical to the federal suit previously dismissed ***without prejudice to*** *refiling*. As noted in Appellant's brief, App. Br. 27, "without prejudice" means without prejudice to refiling. *Black's Law Dictionary*, 10th ed., 569. Appellee-Justices do not address this.

We emphasize this to demonstrate the Justices' brief's pervasive errors down to the fine details. Refiling in state court was also proper under our "savings statute" enacted for precisely this purpose. The Justices cite only "C.R.7" for their "second suit" allegation. This is the petition, which itself lays out the lawfulness of the refiling. Indeed before using this "second suit" language, the Justices' brief had conceded that "Serafine re-filed her exact same suit...[in state court].

We again emphasize that the Justices' complaints are entirely about Serafine's lawful conduct. No one is required to stand by passively, sitting on her rights while the clock ticks.

As to the remainder of the Justices' Statement of Facts: Appellant has already disputed Defendant-appellees' list of allegedly-qualifying "orders"—as they represented them to be in the trial court, which they now mis-describe as "litigations" (J's Br 12). And the evidence shows that these were not *pro se. See infra.* Appellant also disputes that any of these were *finally* "adversely-decided"

but in any event there is nothing to show that the trial judge "based" his orders on this. The Justices' citation to the the judge's orders at C.R.1413-16 is a ruse. Nothing in the orders says what they are based on.

B. *The Justices' brief makes arguments in this Court, but fails to show they were ever presented below or had evidence.*

The Justices open their main argument by telling this Court that Serafine had "five litigations" that were "***finally, adversely determined.***" Js. Br. 18. (The statute actually reads, "finally determined adversely." §11.054(1)(A).) The Justices only now on appeal claim that they met the "finally" criterion. As Appellant's brief showed—left unchallenged by Appellees' brief—in the trial court the Justices' Chapter 11 motion claimed to show only "determined adversely" but not "finally." *See* App. Br. 38-39.

Regardless, the Justices' brief cites nothing to show that they told this to the trial court, much less that they supported the statement in the court below with evidence. The Justices' brief cites nothing more than 12 of their own attachments to filings in the clerk's record. Js' Br. 18-19. Such attachments are not evidence. *Happy Jack Ranch*, *supra* (citing *Guerinot v. Wetherell*, No. 01-12-00194-CV (Tex. App.—Houston [1st Dist.] June 6, 2013) for the proposition that "[s]imply attaching a document to a pleading neither makes the document admissible as

evidence nor dispenses with proper foundational evidentiary requirements").

Far contrary, the only record evidence is Serafine's unchallenged testimony to the opposite. Under oath, RR.1:57, Serafine testified for more than two hours (with some colloquy with the judge), RR.1:64-132, on each of Defendants' eight documents proposed as qualifying "litigations." Serafine began by testifying that there were only *three* cases, not five, much less eight. RR.1:65 et seq. ("[B]y color-coding them blue, red, and black, there are really only three cases here.")

Serafine's testimony continues with admission of Plaintiff's Exhibits 1 to 33, some 240 pages at RR.2:9-250. Taken together this evidence shows that, consistent with Appellant's brief, neither Prong One nor Prong Two was not met. RR.1:64-132.

On page 19 the Justices' brief makes a raft of one-sentence arguments and new factual statements that one court calls "passing arguments." *Reule v. M & T Mortg.*, 483 S.W.3d 600, 617 (Tex. App.—Houston [14th Dist.] 2015, pet. denied) (citing *Goad v. Hancock Bank*, No. 14-13-00861-CV (Tex. App.—Houston [14th Dist.] Apr. 9, 2015) (mem. op.). A "passing argument" contains no substantive argument, analysis, or citation to the record or relevant authorities and constitutes briefing waiver. *Ibid.* On page 19 of their brief and in two long footnotes on that page, the Justices' mis-characterize Serafine's arguments and misleadingly state

purported facts. Js' Br. 19. They cavalierly aver that an argument is "so clearly contrary" that it requires no rebuttal—but they don't say why. *Ibid.* Appellant rejects all of these assertions.

C. *The Court should not adopt the Justices' theory on pages 20-21 of their brief that "seven years" means "eight years."*

It would be error to conclude, as the Justices allege, that the trial court could properly consider "Serafine's 2020 losses in federal court." Js' Br. 20.

The only evidence on the substantive issues—whether these were losses, which they are not—is Serafine's testimony at RR.1:150 et seq.

The Justices' main reasoning is that when a statute specifies the "seven-year-period immediately preceding" the date of the motion, it means seven years prior plus an extra year after the filing. Appellees' motion was filed on December 4, 2019. They want to continue counting purported "losses" far into 2020.

The Justices' reasoning is that when Chapter 11 says that the judge may consider "any evidence," this was the legislature's way of using one statutory subsection to repeal another. To repeat: the Justices advance that the words "any evidence" do not refer to types of evidence; instead they mean to eliminate the existence of a fix time period. This is legal and linguistic nonsense. No court has ever so held.

On page 20 of their brief, however, the Justices advance their second misrepresentation of case law, however, this time using *Douglas*. There, over trenchant dissent, the remaining justices decided whether, in a *sua sponte* vexatious litigant designation, the ***trial court*** was bound to the same 90-day deadline that ordinary movants would be. The judge would not be so bound, the Houston panel held. Appellee-Justices selectively pluck advantageous language from this inapposite decision, falsely representing that the Houston Court opened the floodgates to disregard all of Chapter 11's time periods, thereby permitting their interpretation that seven years means eight years. Js' Br. 20. But no repeal of Chapter 11's seven-year time period came from the Houston panel; and Judge Blomerth here was not acting *sua sponte* in any event. The Houston court merely noted that the *sua sponte* provision did not bind a court to 90 days and was not intended to destroy a court's docket-control discretion. Nothing about this supports the irresponsible interpretation of Chapter 11 that these appellees—justices all—ask this Court to hold.

For their third misrepresentation the Justices falsely advance that later in the *Douglas* litigation the Houston court found that giving Douglas notice and hearing absolved any abuses of discretion, Js' Br. 2—such as Judge Blomerth's allowance that seven means eight and implicitly that Appellant could be ambushed less than

24 hours before the hearing with new documents (that were invisible at the Zoom hearing) claimed to be "losses." *See* App. Br. 44 et seq. What the Houston Court actually meant, set in context, is that even though a *sua sponte* designation has no written motion within the 90-day period, Douglas still got sufficient notice and a hearing.

The *Douglas* cases are unremarkable and do not support the Justices' radical disregard of what Chapter 11 actually says.

The Court should carefully check citations by Defendant-Jurists because their mis-statement of what cases actually stand for is routine, as we have repeatedly had to brief. This is one reason for Appellant's Section 1983 action in this case. SR: 10, 55 (original petition). Litigants have a due process right to *stare decisis*.

Also contrary to the Justices' assertion on page 20 of their brief, Serafine sustained no "losses" in 2020. The denial of certiorari at the U.S. Supreme Court is not an adverse determination; to conclude otherwise is to place too high a price—risk of vexatious determinations—on every non-merits decision the citizens of this state might have to sustain if they challenge a holding.

And the Fifth Circuit merely dismissed the *appeal*, *without prejudice*. Not the case. This does not show Serafine cannot prevail is *this* case in state court.

The Justices provide no binding authority to the contrary.

D. *The Justices' brief at pages 22 to 27 continues to ask this Court for nonsensical interpretations of Chapter 11 and fabrication of "harassing litigations" with no evidence.*

As in the other sections of the Justices' brief, there are no citations to record evidence at pages 22 to 27. Appellant disputes and the evidence disproves the entirety of the Justices' substantive assertions in this section, where they aver Serafine had only "'Co-Counsel'" (in scare quotes) "at time of filing," Js' Br. 22, and she "pursues the same claims over and over again." Js' Br. 23-27.

They cite nothing to show they presented evidence of this below, and any actual evidence is to the contrary. Again the Court may not treat attachments to clerk's filings as evidence. But even if it did the Court would have to analyze them itself.

On the counsel question, the Justices cite only their own counsel's arguments—not testimony—purporting to rely on unauthenticated, unadmitted, and never-produced "exhibits" not in this record. Js' Br. 22. Falsely claiming it was not "rebutted," *id.*, this argument was roundly defeated by Serafine's testimony, admitted attorney time sheets, and admitted canceled checks as evidence of Serafine's out-of-pocket expenditures of over $200,000 for counsel,

RR.1:115. This included payments for consulting or limited scope counsel on "every major paper" she signed alone. RRl:72 et seq.

For example, far from being "co-counsel" "at time of filing," only Mr. Bass (who alone signed the operative petition) handled the successful interlocutory appeal. RR.1:109-110. If Serafine had been cross-examined, she would have testified that only Mr. Bass conducted the trial, he was lead counsel, and Serafine carried out paralegal work.

Defendants still count this—***a matter still on appeal in this Court***—as *pro se* losses "finally determined."

In lieu of crediting this actual evidence below, the Justices ask this Court in their footnote 5 to conduct their own fact-finding on the internet outside the presence of the parties. This the Court is ethically forbidden to do.

The Justices' cited cases are again inapposite because there, the attorneys withdrew, leaving the litigant *pro se*. There is no evidence of withdrawals in Serafine's case (none did), and Serafine had limited scope counsel for every "major decision" the unquestioned testimony shows. RR.1:72.

The Court should turn upside down the Justices' insult at footnote 6 that there is "no evidence" of lead counsel Mr. Vinson's protected work product except his name on papers. We ask the same question of attorneys Webster, Dorfman,

Cowles, and Molinare on Ms. Corbello's papers.

Likewise there is zero record evidence of "harassing litigations" in the court below or in Justices' brief today. Any harassed person could have testified to it, even by affidavit, but apparently no one would or defense counsel did not try.

Again Appellee-Justices steadfastly prefer to present to this Court their own insinuations and fabrications instead of evidence.

No citations even to the clerk's record show that these arguments were presented below.

E. ***Even if the Court searched the record and found that the Justices' arguments at pages 27 to 34 were presented below and respond to Appellant's Brief, the Court would err to find that state courts lack jurisdiction over constitutional claims and would conflict on immunity with the Texas Supreme Court and a sister court.***

Appellant had no requirement below to present evidence or argument on either Prong One or Prong Two. Defendants had the burden.

It is important to note that the Justices could have urged that Serafine could not have prevailed on the petition's factual assertions that Defendant-appellees essentially lied in their opinions and orders about matters (for example, the existence of a motion and hearing) of which they direct knowledge; that they

tampered with the record attempting to make it comport with their fabrications; or committed other intentional denials of due process. The Justices did not urge that Serafine would not prevail on these facts.

Nevertheless, constitutional cases require evidence of facts, and the Justices had none and cited none in support of the jurisdictional and immunity defenses they now claim.

Concerning Prong One: Appellant's brief charged that "Defendants simply did not offer, or get admitted, any evidence that Plaintiff would not prevail" (Prong One). App. Br. 23. The Justices' brief leaves this unchallenged.[7] That is because Defendant-appellees developed no evidence—and do not even attempt to cite the evidentiary record here—that was necessary to find that Serafine would not prevail. The Court would err to do as the Justices did: They treated the petition in this case as though it were a response to summary judgment—the whole of Serafine's case. (It is well over 50 pages but needed only to give fair notice on any matter.) From there, the Justices never quote but freely extemporize and characterize the allegations and prayer self-servingly, and falsely.

This is a federal Section 1983 case. Constitutional questions are never

---

[7] Appellant noted, App. Br. 23, that under *Leonard v. Abbott* the trial court abused discretion because it ruled "without supporting evidence." 171 S.W. 3d, 451, 459 (Tex. App.—Austin 2005).

devoid of facts. The central question on the Justices' theories of sovereign immunity, judicial immunity, and standing is the nature of ***prospective relief*** that plaintiff is seeking in this case. That is a fact question.

Defendant-appellees should have cross-examined Serafine at the hearing after she presented the only evidence (testimony) that the petition seeks only prospective relief. RR.1:122, 124, 131.

On standing, Ms. Corbello gave argument that lacked candor to the court, or misapprehends the law, representing that "the federal court has already found on these exact same facts, the exact same allegations that appropriate (sic) standing doesn't exist, it's indisputable that Ms. Serafine is unlikely to succeed on... in this case." RR.1:19. She cited nothing in support. The conclusion is contrary in our own jurisdiction to *Heckman v. Williamson County*, 369 S.W.3d 137 (Tex. 2012) (reversing Third Court of Appeals). Appellant's brief relies on *Heckman*, App. Br. 2, but the Justices' brief does not mention it.

What the federal district court *did* rule on is that the identical defendants lacked judicial immunity This was in Appellant's brief and Plaintiff's opposition to the vexatious litigant motions—which fact has gone unchallenged by any Defendant-appellee for nearly a year. *See* App.Br. 3, n.6. and C.R.:1136.

Moreover, the Justices are sued in both official and individual (personal)

capacity. ***Judicial immunity does not apply to official capacity claims***; it applies only to personal capacity claims. *Ely v. Hill*, 35 Fed. Appx. 761, 764 (10th Cir. 2002) (citing *Kentucky v. Graham*, 473 U.S. 159, 165-67 (1985).

The Justices' brief also does not even mention the seminal cases that roundly dispute their theories about sovereign immunity and judicial immunity—that is, *Ex parte Young* and *Pulliam v. Allen* in the U.S. Supreme Court, and *Heckman* in the Texas Supreme Court. There is also *Reyna v. City of Weslaco*, 944 S.W.2d 657, 661 (Tex. App. —Corpus Christi 1997).

As to sovereign immunity, the exception to that immunity under *Ex parte Young*, 209 U.S. 123 (1908) applies to this case. "[“T]he basic holding of *Young* [applies] to purely prospective relief...." *Ibid.* (meaning the exception to sovereign immunity applies). *American Bank and Trust Company of Opelousas v. Dent*, 982 F.2d 917, 920 (5th Cir. 1993). Sovereign immunity also does not bar suits against a state official for injunctive relief. *Ex Parte Young*, 209 U.S. 123, 159-160 (1908). The doctrine does bar official capacity suits against state officials for monetary relief, *Ford Motor Co. v. Dep't of the Treasury*, 323 U.S. 459, 464 (1945), but Serafine's petition seeks no monetary relief.

The bottom line is that the Court should not search the record in order to conclude that the Justices' arguments at 27 to 34 were presented below. Even if it

did so it would be error to propound Defendant-appellees theories of sovereign or judicial immunity or standing. Such holdings would conflict with our Supreme Court's *Heckman* decision, create a conflict with *Reyna* in a sister court, and contradict long-standing doctrine.

IV. *This Court cannot remediate what the Justices' failed to do.*

The appellee brief at hand is that of three appellate justices represented by five assistant attorneys general. Their brief should be among the best. By being cavalierly substandard it conveys that appellees believe they will prevail on appeal no matter what. They conveyed the same in the court below.

Texas follows the principle of "party presentation." To maintain neutrality, courts adjudicate the issues only as the parties present them, and nothing more. The Dallas Court of Appeals has most recently set this forth. *Hames Horton v. Stovall*, No. 05-16-00744-CV (Tex. App.—Dallas Dec. 23, 2020). *Hames* emphasized the necessity of due process and impartial, disinterested tribunals. It noted that "[w]e understand when we carry out our duties we must not identify issues and arguments not raised by an appellant."

> The United States Supreme Court explained in *Greenlaw* that the principle of party presentation embodies the appropriate judicial neutrality: [ ] That is, we rely on the parties to frame the issues for

decision and assign to courts the role of neutral arbiter of matters the parties present.

Hames Horton v. Stovall, No. 05-16-00744-CV (Tex. App.—Dallas Dec. 23, 2020) (citations omitted).

A dissenting opinion in a Houston case expressed this with a frequently-used phrase: "[Courts] do not, or should not, sally forth each day looking for wrongs to right." *Ward v. Lamar University*, 484 S.W.3d 440, 457 n. 13 (Tex. App.—Houston [1st Dist.] 2016) (Busby, J., dissenting) (cleaned up).

The Court should not compensate for Appellees' failings.

CONCLUSION AND PRAYER

Appellant seeks the relief requested in the Prayer of her opening brief.

Respectfully submitted,

/s/ John W. Vinson
John W. Vinson
State Bar No. 20590010
Counsel of Record
John W. Vinson, PLLC
PO Box 301678
Austin, Texas 78703
Tel: (512) 926-7380
Email: johnvinsonatty@yahoo.com

/s/ Mary Lou Serafine
Mary Louise Serafine
State Bar No. 24048301
Mary Louise Serafine,
Attorney & Counselor at Law
P.O. Box 4342
Austin, Texas 78765
Tel: 512-220-5452
Email: serafine@mlserafine.com

Attorneys for Plaintiff

CERTIFICATE REGARDING COMPLIANCE WITH RULE 9.4(e)

With reference to Tex. R. App. P. 9.4(e)(i)(2)(B), this brief was produced using Word Perfect software and contains 7451words, as determined by the software's word-count function, excluding the sections of the document listed in Texas Rule of Appellate Procedure 9.4(e)(i)(1).

This brief complies with the typeface requirements of Tex. R. App. P. 9.4(e) because it has been prepared in a proportionally spaced typeface using Word Perfect software in Times New Roman 14 point font in the main text and no smaller than Times New Roman 12 point font in footnotes.

/s/ Mary Lou Serafine
Mary Louise Serafine
State Bar No. 24048301

CERTIFICATE OF SERVICE

My signature below certifies that on the 10th day of September, 2021, I served the foregoing document on the parties listed below through the Court's electronic filing system.

Anthony J. Nelson, Esq., tony.nelson@traviscountytx.gov
Patrick T. Pope, Esq., patrick.pope@traviscountytx.gov
Office of Delia Garza, County Attorney, Travis County
P. O. Box 1748, Austin, Texas 78767
(512) 854-9513/Fax (512) 854-4808
Attorneys for Appellee the Hon. Karin Crump

Courtney Corbello, Esq., courtney.corbello@oag.texas.gov
Law Enforcement Defense Division, Office of the Attorney General
P.O. Box 12548, Capitol Station, Austin, Texas 78711
(512) 463-2080 / Fax (512) 370-9374
Attorney for Appellees the Hon. Melissa Goodwin,
the Hon. Bob Pemberton, and the Hon. David Puryear

/s/ Mary Lou Serafine
Mary Louise Serafine
State Bar No. 24048301

Automated Certificate of eService

This automated certificate of service was created by the efiling system. The filer served this document via email generated by the efiling system on the date and to the persons listed below. The rules governing certificates of service have not changed. Filers must still provide a certificate of service that complies with all applicable rules.

Mary Serafine on behalf of Mary Serafine
Bar No. 24048301
serafine@mlserafine.com
Envelope ID: 57122859
Status as of 9/10/2021 10:23 AM CST

Case Contacts

Name	BarNumber	Email	TimestampSubmitted	Status
Courtney Corbello	24097533	courtney.corbello@oag.texas.gov	9/10/2021 9:57:58 AM	SENT
Anthony J. Nelson	14885800	tony.nelson@traviscountytx.gov	9/10/2021 9:57:58 AM	SENT
John Willis Vinson	20590010	johnvinsonatty@yahoo.com	9/10/2021 9:57:58 AM	SENT
Patrick Pope	24079151	patrick.pope@traviscountytx.gov	9/10/2021 9:57:58 AM	SENT
Mary LouiseSerafine		serafine@mlserafine.com	9/10/2021 9:57:58 AM	SENT